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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC-01-033-52833 Office: Vermont Service Center

Date:

FEB 10 2003

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a long-term care and rehabilitation center with 120 employees and a gross annual income of \$4.7 million. It seeks to employ the beneficiary as a charge nurse for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a letter from the petitioner. The petitioner states, in part, that the position of a charge nurse, which is more complex than that of a staff nurse, normally requires a baccalaureate degree. The petitioner notes that the Department of Veterans Affairs (DVA) has recently endorsed a policy whereby all registered nurses employed in its medical facilities and hospitals would be required to hold a baccalaureate degree in nursing. The petitioner asserts that the DVA runs long-term care facilities, similar to that of the petitioner.

Section 101(a) (15) (H) (i) (b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a) (15) (H) (i) (b), provides in part for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i) (1) of the Act, 8 U.S.C. 1184(i) (1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 C.F.R. 214.2(h) (4) (ii) further defines the term "specialty occupation" as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. 214.2(h) (4) (iii) (A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

In the initial petition, counsel for the petitioner emphasized that the duties of the offered position were so specialized that they could be performed only by a person with a baccalaureate degree.

In support of his claim that the proffered position required a degree, counsel submitted a letter dated September 13, 2000, from the petitioner's administrator who stated that, in accordance with established practice, the proffered position is recognized as a professional position requiring a baccalaureate degree. Counsel also included copies of pages from various publications.

The director requested the petitioner to submit additional evidence regarding the nature of the proffered position. Specifically, the director requested evidence to show the difference between a charge nurse and a staff nurse and describe the educational requirements for a charge nurse.

In response, the petitioner submitted a detailed job description of the proffered position. In addition, the petitioner also included a position statement by the American Association of Colleges of Nursing, recognizing the bachelor of science degree in nursing as the minimum educational requirement for professional nursing practice.

The petitioner submitted a list of six employees in similar positions to the proffered one, all of whom hold B.S. degrees.

The director denied the petition on the basis that the petitioner did not establish that the proposed duties are more complex than those normally performed by registered nurses.

On appeal, the petitioner raises the same issues that were previously addressed in the cover letter dated September 13, 2000, that was submitted with the initial filing of the petition. Therefore, those issues will not be listed again. The petitioner additionally submits a nursing chart showing that the beneficiary would not only supervise nurse aides but also other nurses, including LPN's and RN's.

The petitioner does not present a persuasive argument for classifying the offered position as a specialty occupation. In evaluating whether the offered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. 214.2(h)(4)(iii)(A) will be considered separately below.

I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position - 8 C.F.R. 214.2(h)(4)(iii)(A)(1)

The Service often looks to the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. In the 2002-2003 edition of the Handbook, at page 269, the DOL states the following about the training and educational requirements for registered nurse/supervisory nurse positions:

There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma.

. . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.

. . . some career paths are open only to nurses with bachelor's or advanced degrees. A bachelor's degree is often necessary for administrative positions, and it is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

The petitioner is offering to the beneficiary the position of a registered nurse/supervisory nurse. The offered position is not an administrative position which, depending upon the duties of the position, may require the attainment of a bachelor's or higher degree for the position. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a bachelor's degree in a specific specialty is the minimum requirement for any registered nurse position, including the type being offered to the beneficiary.

II. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree - 8 C.F.R. 214.2(h)(4)(iii)(A)(2)

Factors often considered by the Service when determining the industry standard include: whether the DOL's Handbook reports that the industry requires a degree, whether the industry's professional association has made a degree a minimum entry requirement, and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." Shanti, Inc. v. Reno, 36 F.Supp.2d 1151, 1165 (D.Min. 1999) (quoting Hird/Blaker Corp. v. Slattery, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)).

The DOL's conclusions about a degree requirement for a registered nurse position were discussed in the previous section, and shall not be repeated here. Regarding information from professional nursing associations, neither counsel nor the petitioner presents evidence that any nursing association has made a baccalaureate or higher degree a minimum entry requirement.

The pages from the publication, Dimensions of Professional Nursing, 8th Edition, Copyright 1999, are noted. Although not explicitly stated, the petitioner suggests that such publication indicates that the proffered position has been recognized by the nursing industry as complex and requiring a baccalaureate degree. It is noted, however, that page 333 of such publication states that the requirements for employment in nursing positions in extended and long-term care facilities are similar to those in hospitals for like positions, "although often the need for a degree is not emphasized." (Emphasis added.)

Also noted is the page from another publication, Encyclopedia of Careers and Vocational Guidance, 11th Edition, Copyright 2000. Here again, although not explicitly indicated, counsel suggests that such publication indicates that a bachelor's degree in nursing is required for most supervisory or administrative positions. The cited reference on page 368 states, however, that a bachelor's degree in nursing is required for most supervisory or administrative positions for jobs in public health agencies, and for admission to graduate nursing programs. It is noted that the petitioner is neither a public health agency nor a graduate nursing program.

The petitioner's additional argument against the denial of the petition concerns the DVA's hiring practices for its registered nurse positions. The petitioner states the following about the

impact of this hiring practice on whether a registered nurse position can be considered a specialty occupation:

We submitted evidence of other facilities (advertisements) similar to ours requiring the same educational background for the position. As an example, we included a news release from the Veterans Administration to show that the VA requires all new hires for any nursing position, including the staff position, the baccalaureate degree if they were hired today. This proves that a government agency like the VA recognizes the complexity of the responsibility of the position that it requires no less than a baccalaureate degree for a new nursing employee to care for sick American Citizens.

The petitioner contends that the DVA's enactment of a policy that mandates its registered nurses to have baccalaureate degrees indicates that a degree requirement is common to the industry in parallel positions. The Service, however, does not find the petitioner's statement persuasive.

Although the DVA is the largest employer of registered nurses, it is just one example of an organization that employs registered nurses. The newspaper advertisements from other health care facilities are noted. The petitioner, however, has not presented any other evidence, such as letters or affidavits from hospitals or other employers of registered nurses, that such organizations "routinely employ and recruit only degreed individuals" for the position of a registered nurse. See Shanti, Inc. v. Reno, *supra* at 1165. One employer's hiring practices does not exemplify the industry standard.

The Service strongly disagrees with the petitioner that the policy enacted by the DVA is the "position of the government." The DVA is merely one government agency among many, and its policies are not binding on the Service. As previously stated, the DVA's stipulated educational requirements for its registered nurses do not represent the nursing industry or all employers of registered nurses. Therefore, the Service is not bound to find that the position of a registered nurse is a specialty occupation simply because the DVA has determined that it, alone, shall require its registered nurses to hold a baccalaureate degree.

The Service further contends that the DVA may not be considered a "similar organization," as it employs approximately 36,000 registered nurses, whereas the petitioner employs far less than this number of registered nurses. Instead of relying solely on the DVA's educational requirements, the petitioner should have presented information regarding the educational requirements for registered nurses in facilities that are similar to the size and scope of its operations, in order to establish that a degree in a

specific field of study is common to the industry in parallel positions within similar organizations.

Additionally, the petitioner has not presented any evidence that the offered position is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree.

III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. 214.2(h)(4)(iii)(A)(3)

In a letter dated September 13, 2000, the petitioner's administrator states, in part, that the petitioner's professional position of charge nurse requires a baccalaureate degree in nursing or an equivalent. The petitioner's employment manager also submitted a list of six nurses holding baccalaureate degrees in nursing.

Although the petitioner's past hiring practices indicate that it normally requires a baccalaureate degree in nursing for the proffered position, the petitioner's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, the Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

¹ The court in Defensor v. Meissner observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." Supra at 387.

In this case, although the petitioner claimed to have hired only individuals with a bachelor's degree in nursing for its charge nurse positions, the position, nevertheless, does not meet the statutory definition of specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has required a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty.

IV. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree - 8 C.F.R. 214.2(h)(4)(iii)(A)(4)

The petitioner contends that the proffered position is a "professional level" nursing position and, therefore, encompasses specialized and complex duties that can only be performed by an individual who has attained a baccalaureate or higher degree.

The statement submitted by counsel maintains that the position of a charge nurse requires analytical knowledge in the performance of functions and therefore the position is more complex than those of a staff nurse.

The assertions of counsel do not constitute evidence. Matter of Obaiqbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Although counsel contends that the position of a charge nurse requires the attainment of a baccalaureate or higher degree due to the complex and sophisticated nature of the position's specific duties, counsel does not present any evidence in support of his assertions. Furthermore, although the statement submitted on appeal refers to a charge nurse position as a higher level nursing position requiring a baccalaureate degree as compared to an entry-level staff nurse who does not require such degree, counsel does not demonstrate that the nursing industry is comprised of "professional level" and "entry-level" positions.

Based upon the evidence in the record, the petitioner has not established that the proffered position is a specialty occupation. As with employment agencies as petitioners, the Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See Cf. Defensor v. Meissner, supra. The critical element is not the title of the position, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.

In this case, the petitioner has not shown that the practice of the proffered charge nurse position requires the attainment of a bachelor's degree in a specific specialty.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.